Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

TERRA INTERNATIONAL, INC., *ET AL.*, PETITIONERS,

v.

MISSISSIPPI CHEMICAL CORPORATION, RESPONDENT.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying federal common law to decide the scope of a contractual forum selection clause in connection with a motion to transfer under 28 U.S.C. § 1404(a).

2. Even if the court of appeals correctly applied federal common law, whether it erred in refusing to follow the interpretive principles adopted by the Ninth Circuit and in concluding that Terra's tort claims for property damage arising out of a massive explosion were in reality "artfully pleaded" contract claims subject to the forum selection clause.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the party named as petitioner in the caption, The Insurance Company of North America (INA), National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), Zurich Insurance Company, Commonwealth Insurance Company, Fireman's Fund Insurance Company, and Industrial Risk Insurers, as subrogees of Terra International, Inc., were plaintiffs in the district court, were parties to the proceedings before the court of appeals, and are petitioners here.

Terra International, Inc. is a wholly-owned subsidiary of Terra Industries Inc. Terra International, Inc.'s subsidiaries (other than wholly-owned subsidiaries) are as follows: Royster-Clark, Inc., and Omnium, LLC. INA is a subsidiary of CIGNA Corporation. INA's subsidiaries (other than wholly-owned subsidiaries) are as follows: AFIA, and INA Financial Corporation. National Union is a subsidiary of American International Group, Inc. Zurich Insurance Company's sole subsidiary (other than wholly-owned subsidiaries) is Zurich Life Insurance Company. Commonwealth Insurance Company is a subsidiary of Fairfax Financial Holdings Limited. Fireman's Fund Insurance Company is a subsidiary of Allianz Aktiengesellschaft.

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Terra International, Inc. and its subrogated property insurers (collectively "Terra") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-19a) is reported at 119 F.3d 688. The district court's opinion (App., *infra*, 23a-133a) is reported at 922 F. Supp. 1334.

JURISDICTION

The court of appeals issued its opinion on July 11, 1997. Terra filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on August 18, 1997. App., *infra*, 20a. On September 24, 1997, the court of appeals stayed the issuance of its mandate for thirty days pending the

filing of this petition. App., *infra*, 22a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1404(a) provides that "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

This case presents two important and recurring questions concerning the scope and applicability of contractual forum selection clauses. The first is whether state or federal law governs the interpretation of a forum selection clause when the issue arises in the context of a motion to transfer under 28 U.S.C. § 1404(a). The second is what principle federal courts should use to draw the line between tort and contract claims in deciding how to apply a forum selection clause if, in fact, federal law applies to the question of contract interpretation. The Circuits are split on both issues.

In *Stewart Org.* v. *Ricoh Corp.*, 487 U.S. 22 (1988), this Court held that the *enforceability* of forum selection clauses is governed by federal law, when the issue arises in the context of a motion to transfer under 28 U.S.C. § 1404(a). But the lower courts are still deeply divided over whether the *scope and meaning* of a contractual forum selection clause is to be governed by state or federal law. Courts that apply federal law are also split on what the proper test should be, adopting a bewildering array of different standards for determining whether claims that are pleaded as tort claims are nevertheless subject to a forum selection clause applicable to claims arising under the parties' agreement.

In this case, the Eighth Circuit rejected Terra's argument that it should apply the law governing the parties' contract

(Mississippi law) or the law governing Terra's tort claims (Iowa law) in deciding whether those claims were subject to a forum selection clause. Instead of looking to state law, the Eighth Circuit considered a variety of different approaches suggested by other federal courts. The court rejected the relatively narrow interpretive principle adopted by the Ninth Circuit in *Manetti-Farrow, Inc.* v. *Gucci America, Inc.*, 858 F.2d 509, 514 (1988), under which a forum selection clause applies to tort claims only if "resolution of the claims relates to interpretation of the contract." It also declined to follow the rule articulated by the Third Circuit in *Coastal Steel Corp.* v. *Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983), that tort claims are governed by a contractual forum selection clause only if they "ultimately depend on the existence of a contractual relationship." In the end, the Eighth Circuit adopted the First Circuit's much broader test, concluding that even tort claims for property damage arising out of an explosion must be deemed to arise under a contract—and therefore be subject to a forum selection clause—so long as they "involve the same operative facts as would a parallel claim for breach of contract." App., *infra*, 13a-14a (following *Lambert* v. *Kysar*, 983 F.2d 1110, 1121 (1993)).

For all of the reasons outlined below, the Eighth Circuit erred in applying federal common law to a simple question of contract interpretation. Federal courts have no particular expertise in contract law, and there is no discernible federal policy to guide the development of governing principles. Thus, it is not surprising that the use of federal common law has lead to pervasive confusion in the lower courts about the proper standards to be applied in deciding whether tort claims are governed by a contractual forum selection clause. That confusion has had serious practical consequences, causing needless, prolonged and expensive litigation over the issue of venue — a point graphically illustrated by this case, where the dispute over

venue has lasted for more than two years and resulted in a 104-page opinion from the district court and a 17-page opinion from the court of appeals.

The confusion can and should be ended by requiring federal courts to look to the governing state law in interpreting forum selection clauses, just as they do in interpreting other contract provisions. Alternatively, if this Court agrees that federal common law applies, it should eliminate the conflicts that currently exist by adopting a simple rule that will ensure consistency and predictability in the interpretation of forum selection clauses.

1. This is a product liability action arising out of a catastrophic explosion that destroyed Terra's ammonium nitrate manufacturing facility in Port Neal, Iowa. Four Terra employees were killed and eighteen others were seriously injured in the explosion. Terra suffered property damage and other losses in excess of $375 million. After an eight-month investigation, Terra concluded that the explosion had been caused by design defects in technology licensed to Terra by respondent Mississippi Chemical Corporation (MCC). On August 31, 1995, Terra filed this diversity action against MCC in federal court in Iowa, seeking to recover under theories of strict liability and negligence for the devastation caused by the explosion. Hours after Terra filed in Iowa, MCC filed a mirror-image complaint in federal court in Mississippi, seeking a declaration that it was not liable to Terra and seeking damages for allegedly defamatory statements Terra made in the course of publicly explaining the results of its investigation.

Soon after the lawsuits were filed, Terra sought injunctive relief in the Iowa district court to prevent MCC from proceeding with its later-filed action in Mississippi. MCC countered by moving to transfer the Iowa case to Mississippi under 28 U.S.C. § 1404(a). In support of that motion, MCC cited a

forum selection clause in the License Agreement between Terra and MCC, which provides that "[a]ny dispute or disputes arising between the parties hereunder * * * will be determined in the District Court of the United States for the Southern District of Mississippi." App., *infra*, 3a.

2. The district court granted MCC's motion to transfer and therefore denied Terra's motion for an injunction. The sole basis for the transfer was the court's determination that the forum selection clause applied to Terra's tort claims.[1] The district court read the clause broadly, stating that the phrase "disputes arising between the parties hereunder" referred to *any* dispute between the parties, whether or not it arose under the License Agreement. *Id.* at 112a. In addition, the court held that even if the forum selection clause were limited to disputes arising under the License Agreement, Terra's tort claims met that test because, but for the grant of the license, Terra would not have purchased the neutralizer technology from MCC and therefore would not have had a claim against MCC. *Id.* at 121a-123a.

3. On appeal from the denial of the injunction, the court of appeals disagreed with the district court's interpretation of the forum selection clause,[2] holding that "the parties intended the forum selection clause in this case to apply *only* to disputes

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[1] The district court made clear that it would not have transferred the case absent the forum selection clause and instead would have invoked the first-filed rule to enjoin MCC from proceeding with its action in Mississippi. App., *infra*, 132a-133a. Thus, as the Eighth Circuit recognized, the forum selection clause was the controlling factor in the analysis. *Id.* at 18a.

[2] The district court stayed its transfer order to enable Terra to take an appeal from the denial of its motion for an injunction. Thus, Terra's case remains in Iowa. However, in the interim, discovery in both cases has proceeded under the auspices of the Mississippi federal court.

arising under the license agreement." App., *infra*, 9a-10a (emphasis added). The Eighth Circuit then turned to the question of whether Terra's common law tort claims in fact arose under the Agreement. In analyzing that issue, the court did not discuss the Mississippi and Iowa case law cited by Terra. Instead, the court limited its analysis to a review of a number of federal cases addressing "very similarly-worded forum selection clauses." *Id.* at 11a. The court noted that these cases "reached different conclusions," and that "several courts have . . . articulated variously-phrased general rules regarding the circumstances in which a forum selection clause will apply to tort claims." *Id.* at 11a, 12a.

The court considered three different approaches adopted by three different Circuits. First, the court quoted the Third Circuit's test in *Coastal Steel*, 709 F.2d at 203, under which tort claims that "'ultimately depend on the existence of a contractual relationship' between the parties . . . are covered by a contractually-based forum selection clause." App., *infra*, 12a. The Eighth Circuit declined to follow this test, however, on the ground that it was "inconclusive in this case":

> MCC asserts that Terra's tort claims do ultimately depend on the existence of a contractual relationship because without the license agreement, MCC would not have provided Terra with its neutralizer technology. Terra, however, argues forcefully that its tort claims are based on MCC's alleged breach of its common law tort duties which are independent of the contract.

App., *infra*, 13a. The court then considered an alternative test articulated by the Ninth Circuit in *Manetti-Farrow, Inc.* v. *Gucci America, Inc.*, 858 F.2d 509, 514 (1988), which held that "[w]hether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpre-

tation of the contract." The court acknowledged that, under the Ninth Circuit's test, Terra's tort claims would probably *not* be governed by the forum selection clause. But, once again, it found the result too inconclusive to adopt the Ninth Circuit's rationale.[3]

In the end, the Eighth Circuit settled on the First Circuit's approach in *Lambert* v. *Kysar*, 983 F.2d 1110 (1993), which holds that "'contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties.'" App., *infra*, 12a (quoting *Lambert*, 983 F.2d at 1121-1122). The only reason the court gave for adopting the First Circuit approach was that it was "more revealing in this case" and clearly led to the conclusion that Terra's tort claims were subject to the forum selection clause:

> We think it is clear that Terra's tort claims involve the same operative facts as would a parallel claim for

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[3] The Court stated that

> At first glance it appears that Terra's tort claims would not be covered by the forum selection clause under the Ninth Circuit's test because the resolution of these products liability claims does not seem to relate to or require the interpretation of the license agreement. Nevertheless, while these tort claims do not center around a disagreement over the specific terms of the license agreement, one could argue that they "relate" to the agreement's interpretation because the tort claims directly involve the entire subject matter of the license agreement.

App., *infra*, 13a.

> breach of contract. Admittedly, Terra did not raise any claims for breach of contract in its complaint. Strategic or artfully drawn pleadings, however, will not work to circumvent an otherwise applicable forum selection clause. See *Lambert*, 983 F.2d at 1121; *Coastal Steel*, 709 F.2d at 203. Although we recognize that Terra's claims are alleged as tort claims, Terra plainly could have asserted a parallel claim for breach of contract in the same complaint. The fact that MCC's technology allegedly caused an explosion that actively inflicted damage does not transform Terra's cause of action into one based exclusively in tort. The same exact facts surrounding Terra's tort claims would also give rise to a breach of contract claim. Therefore, according to the rationale of the First Circuit's rule in *Lambert*, we believe that the forum selection clause applies to Terra's tort claims.

App., *infra*, 13a-14a.

After briefly reviewing the factors customarily applied under § 1404(a), the court of appeals held that the forum selection clause was dispositive of the venue question. App., *infra*, 15a-19a. Although the court was "quite skeptical of the district court's conclusion that the balance of convenience was flat," it nevertheless concluded that "[e]ven if we tend to believe that the convenience factors weigh in favor of an Iowa forum, * * * we cannot say that they so overwhelmingly favor Iowa as to outweigh the significance of the * * * forum selection clause * * * to such a degree that the district court abused its discretion." *Id.* at 18a. And while acknowledging that it "may have reached a different decision than the district court," the court of appeals affirmed the transfer order on the ground that the district court "did not abuse its discretion in deciding to transfer this lawsuit to Mississippi." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S USE OF FEDERAL COMMON LAW TO DECIDE THE SCOPE OF THE FORUM SELECTION CLAUSE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

In *Stewart Org.* v. *Ricoh Corp.*, 487 U.S. 22 (1988), this Court held that the question of whether a forum selection clause is *enforceable* in federal court is governed by "federal law, specifically 28 U.S.C. § 1404(a)," and that such clauses should receive "the consideration for which Congress provided in § 1404(a)." 487 U.S. at 31-32. However, *Stewart* declined to address the larger question presented here of whether, under *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), the *interpretation* of forum selection clauses should also be governed by federal law. See *Manetti-Farrow, Inc.* v. *Gucci America, Inc.*, 858 F.2d 509, 512 (9th Cir. 1988) ("the Supreme Court's decision in [*Stewart*] does not fully resolve th[e] problem" of how forum selection clauses should be interpreted).

As the Ninth Circuit observed in *Manetti-Farrow*, "the application of the *Erie* doctrine to forum selection clauses * * * has led to a split among the circuit courts of appeals as to whether state or federal law should be applied." *Id.* at 512. Accord *Lambert* v. *Kysar*, 983 F.2d 1110, 1116 n.10 (1st Cir. 1993) ("The Supreme Court has yet to provide a definitive resolution of the *Erie* issue, * * * which has divided the commentators and split the circuits").[4] In this case, the Eighth Circuit adopted a federal common law rule articulated by the First Circuit, ignoring the state law that governs the parties'

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[4] See also R. de By, Note, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM L. REV. 1068, 1069 (1989) (*Stewart*, "although it initially seemed about to do so, never addressed the pure *Erie* question").

License Agreement and Terra's tort claims in favor of an approach that the court of appeals found "more revealing."

The Eighth Circuit's decision to use federal common law conflicts with decisions of other Circuits, which have concluded that state law should apply to questions of contract interpretation—even if enforceability remains a question of federal law. The decision also conflicts with this Court's recent *Erie* decisions, which have limited the use of federal common law to circumstances in which application of state law would conflict with an overriding federal law or policy. See, *e.g.*, *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997); *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 83 (1994). Terra urges this Court to grant its petition, or to vacate and remand the decision below in light of *Atherton* and *O'Melveny*, in order to bring much needed clarification to an important area of law.

A. The Circuits Are Split Over Whether The Applicability Of Forum Selection Clauses Is Governed By State Law Or Federal Common Law.

Following *Stewart*, there has been a great deal of uncertainty in the federal courts as to what law should be applied in deciding whether a claim in governed by a forum selection clause. See, *e.g.*, *Manetti-Farrow*, 858 F.2d at 512 (the "circuit courts of appeals have reached conflicting results" as to whether the applicability of forum selection clauses is governed by state or federal law); *Northwestern Nat'l Ins. Co.* v. *Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) (Posner, J.) ("[t]here is a division between the circuits on the question"); *Caribe BMW, Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*, 821 F. Supp. 802, 816 (D. P.R. 1993) ("In the context of a diversity case such as the present one, there is some confusion as to whether forum-selection clauses are to be treated as substantive or procedural under the *Erie* doctrine. * * * The Supreme Court has not squarely resolved the issue and the circuits are split"),

vacated on other grounds, 19 F.3d 745 (1st Cir. 1994).[5] As the First Circuit noted, "[t]he Second, Ninth and Eleventh Circuits essentially treat forum clauses as procedural" and therefore governed by federal law, while "[t]he Third and Eighth Circuits, and Justice Scalia (who sought to reach the *Erie* issue in *Stewart*), seem to view forum selection clauses as substantive. . . ." and therefore governed by state law. *Lambert*, 983 F.2d at 1116 n.10 (citing *Stewart*, 487 U.S. at 38-41 (Scalia, J., dissenting) (collecting cases)).

While *Stewart* held that the *validity* of a forum selection clause was governed by federal law under § 1404(a), it left unresolved the question whether the *meaning and scope* of such a clause should also be governed by federal law or by the applicable state law. As Judge Posner explained:

> The specific question in *Stewart* was whether, if a party moves for a change of venue under 28 U.S.C. § 1404(a) to the forum designated in the parties' forum selection clause, the court in considering the motion should treat the issue of clause's validity as one of federal law. * * * *Validity and interpretation are separate issues*, and it can be argued that as the rest of the contract in which a forum selection clause

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[5] Accord, *e.g.*, M. Lampe, Note, *Forum Selection Clauses Designating Foreign Courts: Does Federal or State Law Govern Enforceability In Diversity Cases? A Question Left Open By Stewart Organization, Inc.* v. *Ricoh Corp.*, 22 CORNELL INT'L L.J. 307, 309 (1989) (noting the "ambiguity as to whether federal or state law provides the rule of decision"); P. Kornfeld, Note, *The Enforceability of Forum-Selection Clauses After Stewart Organization, Inc.* v. *Ricoh Corporation*, 6 ALASKA L. REV. 175, 189 (1989) ("*Stewart* * * * can hardly be said to have resolved all of the ambiguities surrounding forum-selection clauses"); R. de By, Note, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM L. REV. 1068, 1071 (1989).

> is found will be interpreted under the principles of interpretation followed by the state whose law governs the contract, so should that clause be.

Northwestern Nat'l Ins., 916 F.2d at 374 (emphasis added). See also Kornfeld, *supra*, 6 ALASKA L. REV. at 189 ("*Stewart* has done little to enhance the predictability of the outcome when a forum-selection clause is at issue in a federal court").

As the Seventh Circuit observed in *Northwestern*, the circuits have been unable to reach a consensus on what law governs the interpretation of a forum selection clause. For instance, in *Jumara* v. *State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995), the Third Circuit held that while the *enforceability* of a forum selection clause was governed by federal law (*id.* at 877-878), the *scope* of the clause was controlled by state law. *Id.* at 881-882. Accord *Karl Koch Erecting Co.*. v. *New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-659 (2d Cir. 1988) (interpreting forum selection clause in accordance with state law). In *Manetti-Farrow*, by contrast, the Ninth Circuit, citing *Stewart*, disagreed with the Third Circuit's view, and held that "because enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum selection clauses." 858 F.2d at 513. Accord *Omron Healthcare, Inc.* v. *Maclaren Exports Ltd.*, 28 F.3d 600, 603 (7th Cir. 1994); *Frediani & Delgreco, S.P.A.* v. *Gina Imports*, 870 F. Supp. 217, 220 (N.D. Ill. 1994) (holding that federal law "determines the enforceability *and construction* of the forum selection clause") (emphasis added).

The confusion and uncertainty over how forum selection clauses should be interpreted is now even more apparent given this Court's recent *Erie* decisions, which have sharply restricted the circumstances in which federal common law rules may be created and applied. Review by this Court is necessary to

resolve this uncertainty, which has deprived contracting parties of the benefits of predictability that forum selection clauses are designed to provide.[6]

B. The Eighth Circuit's Use Of Federal Common Law Conflicts With This Court's Recent Decisions Sharply Limiting Application Of Federal Common Law Rules.

The court of appeals' use of ad hoc federal common law rules to interpret the forum selection clause at issue here cannot be squared with this Court's recent *Erie* decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997). The issue in *O'Melveny* was whether state or federal law governed the imputation of an officer's knowledge to a failed savings and loan. The FDIC, in its capacity as receiver, argued that in light of the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), federal common law ought to govern. Justice Scalia, writing for a unanimous Court, rejected the government's position as "plainly wrong" on the ground that "'[t]here is no federal general common law'," and that "the remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation." *Id.* at 83 (quoting *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938)).

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[6] See generally P. Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895 (1996); A. Ides, *The Supreme Court and the Law To Be Applied In Diversity Cases: A Critical Guide To Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 71 (1995) ("Until the Court settles upon such a framework, and announces that framework in clear and unmistakable language, individual decisions will continue, when the moon is full, to transform simple cases into werewolves that roam the *Erie* forest wre[a]king random acts of jurisprudential violence upon unsuspecting and innocent litigants. And one can expect lower federal courts to be subject to this same disquieting habit").

The *O'Melveny* Court explained that the circumstances in which federal common law rules may properly be used are "few and restricted,"

> limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law. * * * Our cases uniformly require the existence of such conflict as a precondition for recognition of a federal rule of decision. * * * Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict.

512 U.S. at 87-88. As one commentator has noted, *O'Melveny* "represent[ed] a large step in the Supreme Court's federal common law jurisprudence[,] * * * mak[ing] plain that the proponent of a nationwide federal rule will have to make a strong showing before a court may 'displace' the state law rule." Lund, *supra*, 76 B.U. L. REV. at 995, 997-98.

Earlier this year, in *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997), this Court reaffirmed O'Melveny's strict limitations on the use of federal common law rules, rejecting the government's claim that because of a "need for 'uniformity,'" the standard of care applicable to officers and directors of failed federal thrifts under 12 U.S.C. § 1821(k) should be governed by a uniform set of federal common law rules. *Id.* at 670-671. As in *O'Melveny*, *Atherton* held that use of federal common law was unjustified because application of state law tort rules posed "no significant conflict with, or threat to, a federal interest." *Id.* at 673.

When the principles reiterated in *O'Melveny* and *Atherton* are applied here, it becomes apparent that there is no basis for creating federal common law rules to interpret the meaning and scope of contractual forum selection clauses. While *Stewart* held that § 1404(a) governs the *enforceability* of a forum selection

clause, there is nothing in *Stewart*, in § 1404(a) or its legislative history that even remotely suggests that Congress ever meant to sanction the wholesale creation of a body of federal contract law to determine the *scope* of such clauses. Nor is there any discernible federal interest in the outcome of disputes over the scope of forum selection clauses—let alone a sufficiently compelling interest to override the traditional role of state law in providing rules of contract interpretation. See Lund, *supra*, 76 B.U. L. REV. at 958 (after *O'Melveny* and *Atherton*, "[w]hen a federal court acts unilaterally to 'displace' governing state law, based on its own conceptions of proper and necessary federal policy, it runs headlong into substantial federalism and separation of powers objections").

The confusion—catalogued in Part III below—that has developed in the federal courts as a result of the use of federal common law to interpret forum selection clauses illustrates the folly of any attempt to develop a federal common law outside the narrow boundaries described in *O'Melveny* and *Atherton*. As Justice Scalia observed in his dissent in *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*, 117 S. Ct. 1783, 1789 (1997), "unlike state courts, [the federal courts] have little first-hand experience in the development of new common-law rules of tort and contract governing commercial transactions." When that lack of familiarity is coupled with the complete absence of any federal policy to guide the development of governing legal principles, the result is inevitably the kind of conflicting, standardless decision-making reflected in this case. For without knowing whether forum selection clauses should be broadly or narrowly construed or how the line should be drawn between tort and contract claims, federal courts simply have no basis for choosing any rational principle of decision.

The better rule—and the only rule consistent with *O'Melveny* and *Atherton*—is to look to state law. In this case, if the Eighth Circuit had considered the law of either Missis-

sippi (which governs the interpretation of the license agreement generally), or Iowa (which applies to Terra's tort claims), it would have reached a different result. As demonstrated below, under the law of either state, it is clear that Terra's tort claims are exactly what they purport to be, and are not "artfully pleaded" contract claims that should therefore be subject to the contractual forum selection clause.

C. The Court Of Appeals' Decision Conflicts With The State Law Governing The Parties' Contract And Terra's Product Liability Claims.

The court of appeals' use of federal common law has plainly prejudiced Terra, since the federal common law it adopted is inconsistent with applicable state law. The court of appeals held that Terra's negligence and strict liability claims were governed by the forum selection clause in the parties' License Agreement because "Terra's tort claims involve the same operative facts as would a parallel claim for breach of contract," and because while "Terra's claims are alleged as tort claims, Terra plainly could have asserted a parallel claim for breach of contract in the same complaint." App., *infra*, 13a-14a. As Terra argued below, however, this rule is contrary to both Iowa and Mississippi law. Indeed, under the law of both States, the line between contract and tort has nothing at all to do with whether a contract claim *could* be brought. It is instead a function of the *nature of the loss* for which a recovery is sought.

Mississippi and Iowa both have adopted what has come to be known as the "economic loss" doctrine to distinguish between (1) claims that "arise under" a contract and (2) claims that arise out of duties imposed by law for the protection of people and property. A claim is deemed to be a tort claim under Mississippi law "if a sudden and calamitous occurrence" involving a defective product "caused personal injury or

property damage;" by contrast, contract law applies where the plaintiff seeks to recover only economic losses arising out of "a commercial dispute in which commercial purchasers complain that a product has not functioned as was expected and intended." *IHP Industrial, Inc.* v. *PermAlert, Esp.*, 947 F. Supp. 257, 261-262 (S.D. Miss. 1996).[7] Similarly, under Iowa law, "contract law protects a purchaser's expectation interest that the product received will be fit for its intended use," while the "essence of products liability law is that the plaintiff has been exposed, through a dangerous product, to a risk of injury to his person or property." *Tomka* v. *Hoechst Celanese Corp.*, 528 N.W.2d 103, 107 (Iowa 1995).[8]

The rule adopted by the Eighth Circuit in this case — that tort claims arise under a contract if the plaintiff "could have asserted a parallel claim for breach of contract in the same complaint" — has been specifically rejected in Mississippi. Under Mississippi law, the question whether a claim arises under a contract has nothing to do with whether a contract claim *could have* been brought. As the Mississippi Supreme Court explained in *Hazell Machine Co.* v. *Shahan*, 161 So. 2d

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[7] See also *East Miss. Elec. Power Ass'n* v. *Porcelain Prods. Co.*, 729 F. Supp. 512, 517 (S.D. Miss. 1990) (contract law governs "commercial dispute[s] in which plaintiffs' ultimate complaint is that the [products] have not performed as expected," while tort law governs cases involving "accidental physical injury" caused by a product); *Lee* v. *General Motors Corp.*, 950 F. Supp. 170, 172-174 (S.D. Miss. 1996) (same).

[8] See also *Nelson* v. *Todd's Ltd.*, 426 N.W.2d 120, 125 (Iowa 1988) (contract law applies when "the loss relates to a consumer or user's *disappointed expectations* due to deterioration, internal breakdown or non-accidental cause," while tort law applies when "the harm is a *sudden or dangerous occurrence*, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect") (emphasis added); *Richards* v. *Midland Brick Sales Co.*, 551 N.W.2d 649, 651-652 (Iowa App. 1996) (same).

618, 623 (Miss. 1964), a tort "may sometimes have relation to obligations growing out of, or coincident with, a contract, and *frequently the same facts will sustain either class of action.*" (Emphasis added) (citation omitted). But that does not mean that such a tort claim is, in reality, an "artfully pleaded" contract claim, as the Eighth Circuit concluded here. Instead, "a tort is distinguished from a breach of contract in that the latter arises under an agreement of the parties, whereas the tort, ordinarily, is a violation of a duty fixed by law, independent of contract or the will of the parties." *Id.*

If the Eighth Circuit had applied either Mississippi or Iowa law, instead of its own version of federal common law, the court would have been compelled to conclude that Terra's tort claims were not governed by the forum selection clause. Terra's product liability claims are quintessential tort claims. The gravamen of Terra's tort claims is *not* that some defect in the ammonium nitrate neutralizer resulted in disappointed commercial expectations. Rather, Terra has alleged that a dangerous defect in MCC's technology caused "a sudden and calamitous occurrence" — resulting in hundreds of millions of dollars worth of property damage. Under the economic loss doctrine applied in both Mississippi and Iowa, Terra's claims plainly sound in tort, and do not arise under its License Agreement with MCC.[9]

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[9] Forum selection clauses are unenforceable under Iowa law. See *Davenport Mach. & Foundry Co.* v. *Adolph Coors Co.*, 314 N.W.2d 432 (Iowa 1982). Although, under *Stewart*, Iowa law does not govern the question of enforceability, Iowa law clearly counsels against the kind of broad interpretation of a forum selection clause adopted here.

II. EVEN IF FEDERAL COMMON LAW APPLIES, THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH RULINGS OF OTHER CIRCUITS AND THIS COURT ON THE STANDARD TO BE APPLIED IN DETERMINING WHETHER A CLAIM "ARISES UNDER" A CONTRACT.

Even if this Court were to conclude that the meaning and scope of a forum selection clause is properly a matter of federal common law, the need for this Court's review would be just as compelling. The courts that have applied federal common law have been unable to agree on the standards that should govern whether common law tort claims are covered by a contractual forum selection clause. And in this particular case, the federal common law rule adopted by the court of appeals squarely conflicts with this Court's long-standing federal common law decisions, which have adopted the very same economic loss doctrine that state courts throughout the country, including Mississippi and Iowa, have used to distinguish between tort and contract claims.

A. The Circuits Are Split Over Whether Forum Selection Clauses Apply To Common Law Tort Claims.

As the Eighth Circuit explained, the Circuits "have articulated variously phrased general rules regarding the circumstances in which a forum selection clause will apply to tort claims." App., *infra*, 12a. See also *Lambert*, 983 F.2d at 1121 (noting the circuit split); *Graham Tech. Solutions* v. *Thinking Pictures, Inc.*, 949 F. Supp. 1427, 1433 (N.D. Cal. 1997) (noting the "the conflicting circuit case law addressing this issue"). The confusion among the federal courts has resulted in the absence of a consistent and uniform rule, and has prevented parties from knowing in advance with any measure of confidence which claims will be governed by a forum selection clause and which will not.

The court of appeals itself acknowledged (App., *infra*, 12a-13a) that the circuits have split in at least three different directions as to the standard governing whether common law tort claims are covered by contractual forum selection clauses. The First Circuit, for instance, held that "contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties." *Lambert*, 983 F.2d at 1121-1122. See also *Lawler* v. *Schumacher Filters Am., Inc.*, 832 F. Supp. 1044, 1052 (E.D. Va. 1993) (same). The Ninth Circuit, on the other hand, in a widely followed decision, held that "[w]hether a forum selection clause applies to tort claims *depends on whether resolution of the claims relates to interpretation of the contract.*" *Manetti-Farrow, Inc.*, 858 F.2d at 514 (emphasis added). Under this test, if "the tort causes of action alleged by [the plaintiff] relate to '[a] central conflict over the interpretation' of the contract, they are within the scope of the forum selection clause." *Ibid.*[10] The Third Circuit has taken yet

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[10] Accord, *e.g.*, *Omron Healthcare, Inc.* v. *Maclaren Exports Ltd.*, 28 F.3d 600, 603 (7th Cir. 1994) (holding that forum selection clauses extend to "disputes the resolution of which arguably depend on the construction of an agreement"); *General Envt'l Science Corp.* v. *Horsfall*, 25 F.3d 1048, 1994 WL 228256, *8-9 (6th Cir. 1994) ("No contractual claims are made and no contract remedies are sought. * * * This suit is, therefore, broader than the forum selection clause"); *S-Fer Int'l, Inc.* v. *Paladion Partners, Ltd.*, 906 F. Supp. 211, 214 (S.D.N.Y. 1995) ("even assuming the forum selection clause is otherwise valid and enforceable, this case [a tort case] does not fall within the scope of the clause. Accordingly, the presence of the forum selection clause in the lease does not support a transfer of this action"); *Graham Tech. Solutions* v. *Thinking Pictures, Inc.*, 949 F. Supp. 1427, 1433 (N.D. Cal. 1997) ("This court has considered the conflicting circuit case law addressing this issue, and determines that the better view, and the one that is consistent with the Ninth Circuit approach adopted in *Manetti-Farrow*, is the one which upholds the forum selection clause where the claims alleged in the complaint *relate to* the interpretation of the contract."); *Berrett* v. *Life Ins. Co.*, 623 F. Supp. 946, 948-949 (D. Utah

another approach, holding that tort claims are governed by a contractual forum selection clause if those "claims ultimately depend on the existence of a contract relationship" and if "the relationship between the parties is contractual." *Coastal Steel Corp.* v. *Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983).[11] Other courts have adopted more than one of these tests, or have simply fashioned their own hybrid approach. See, *e.g.*, *Banco Popular* v. *Airborne Group PLC*, 882 F. Supp. 1212, 1217 (D.P.R. 1995).

1985) (same); *General Envt'l Science Corp.* v. *Horsfall*, 753 F. Supp. 664, 668 (N.D. Ohio 1990) (holding that tort claims are not governed by forum selection clause where claims did not directly concern formation or enforcement of the contract).

[11] Accord, *e.g.*, *Stewart Org.* v. *Ricoh Corp.*, 810 F.2d 1066, 1070 (11th Cir. 1987) (*en banc*), *aff'd on other grounds*, 487 U.S. 22 (1988); *National Micrographics Sys.* v. *Canon U.S.A.*, 825 F. Supp. 671, 677 (D.N.J. 1993) ("all claims arising out of a business relationship may be subject to the forum selection clause of the contract defining the parties' duties"); *Roby* v. *Corporation of Lloyd's*, 996 F.2d 1353, 1360-1361 (2d Cir. 1993) "We refuse to allow a party's solemn promise to be defeated by artful pleading. * * * There is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses") (citing *Coastal Steel*); *Cheever* v. *Academy Chicago Ltd.*, 685 F. Supp. 914, 917 n.2 (S.D.N.Y. 1988) ("[i]f the tort claims arise out of, or because of, the publishing agreement, the forum-selection clause would seem to control torts related to the agreement, as well as contract claims"); *Stephens* v. *Entre Computer Ctrs., Inc.*, 696 F. Supp. 636, 638 (N.D. Ga. 1988) ("All these claims [both contract and tort] arise either 'directly or indirectly from the business relationship evidenced by the contract,' and are therefore subject to the forum selection clause"); *Pascalides* v. *Irwin Yacht Sales N., Inc.*, 118 F.R.D. 298, 302 (D.R.I. 1988) ("If forum selection clauses are to be enforced as a matter of public policy, that same public policy requires that they not be defeated by artful pleading of claims such as negligent design, breach of implied warranty, or misrepresentation"); *Tisdale* v. *Shell Oil Co.*, 723 F. Supp. 653, 662 (M.D. Ala. 1987) (same).

In this case, the test adopted by the Eighth Circuit determined the outcome of the venue dispute. As the Eighth Circuit itself noted, it seems likely that the forum selection clause would not apply under the Ninth Circuit's test inasmuch as the resolution of Terra's strict liability and negligence claims does not depend on any interpretation of the parties' License Agreement. Tort law, and not the License Agreement, defines MCC's duties to Terra, and common law tort principles alone will determine whether and to what extent MCC is liable to Terra for designing an unreasonably dangerous product.

B. Under This Court's Federal Common Law Decisions, Tort And Contract Claims Must Be Distinguished According To The Nature Of The Recovery Sought.

If a federal common law rule is to be applied in interpreting forum selection clauses, the rule should be derived from this Court's federal common law decisions. Like the majority of state courts, this Court has adopted the economic loss doctrine, under which the line between tort and contract claims depends on the nature of the loss for which a recovery is sought. Where the plaintiff seeks recovery for personal injury or physical damage resulting from an event like the explosion of Terra's plant, the claim sounds in tort; where, on the other hand, the plaintiffs seeks economic losses arising out of disappointed contract expectations, the claim sounds in contract. See *East River Steamship Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 868-869 (1986). This set of rules has the benefit of being easily applied and predictable, and not subject to manipulation through "artful pleading." In addition, the economic loss doctrine is grounded in what have become well-settled common law principles.

As this Court explained in *East River*:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery

> for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.

476 U.S. at 871 (quoting *Seely* v. *White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965)). The Court further explained that "[p]roducts liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty." 476 U.S. at 866. The "paradigmatic products-liability action" is one in which a product "causes bodily injury," but "[f]or similar reasons of safety, the manufacturer's duty of care was broadened to include protection against property damage. * * * Such damage is considered so akin to personal injury that the two are treated alike." 476 U.S. at 866-867 (citations omitted). See also *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*, 117 S. Ct. 1783, 1786 (1997) ("tort law in this area ordinarily (but with exceptions) permits recovery from a manufacturer and others in the initial chain of distribution for foreseeable *physical* harm to property caused by product defects") (emphasis in original).

Contrary to *East River*, the court of appeals in this case concluded that common law tort claims asserted by one party to a contract against another must be deemed to arise under the contract because otherwise "[s]trategic or artfully drawn pleadings" would "work to circumvent an otherwise applicable forum selection clause." App., *infra*, 13a 14a. For precisely this reason, however, the economic loss doctrine provides the coherent and predictable rationale that is absent from the court of appeals' analysis. Under *East River* and *Saratoga*, the label a plaintiff attaches to a particular claim makes no difference. There can be no artful pleading. What matters is whether the plaintiff is seeking recovery for "purely economic losses" or

"disappointed contractual expectations," on the one hand, or for personal injuries or physical damage to property resulting from a defective or dangerous product, on the other. Contrary to the reasoning of the court of appeals, if a plaintiff seeks recovery for property damage caused by a defective product, it makes no difference that the plaintiff could also assert a contract claim. Indeed, in *Saratoga*, this Court flatly rejected the notion that "the ordinary rules governing the manufacturer's tort liability should be supplanted merely because the [seller] may in theory incur an overlapping liability in contract." *Saratoga*, 117 S. Ct. at 1788.

III. THE QUESTIONS PRESENTED ARE OF GREAT PRACTICAL AND LEGAL IMPORTANCE.

There is nothing more wasteful than litigation about where to litigate. Unfortunately, as the 104-page decision of the district court and the scores of other decisions from around the country graphically confirm, the meaning and scope of contractual forum selection clauses has fostered an enormous amount of expensive and unnecessary collateral litigation over the issue of venue. Valuable judicial and private resources will continue to be wasted on issues that surely can be resolved more readily under a clarified body of legal rules that only this Court can provide.

The Eighth Circuit's decision in this case typifies the confusion that now surrounds the use and applicability of forum selection clauses. This confusion is not likely to be resolved without this Court's intervention. Distinguishing between tort claims and contract claims is an ever-present challenge in modern commercial litigation, and one that will continue to plague the federal courts whenever they are called upon to determine whether tort claims are governed by contractual forum selection clauses.

"Venue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue." *Stewart*, 487 U.S. at 39 (Scalia, J., dissenting). A forum selection clause is an important part of the contractual bargain. If such clauses are to provide contracting parties with the benefits of predictability they were meant to provide, it is imperative that the source of the law governing the interpretation of such clauses be clear. And if that source is to be federal law, there should be only one standard, based on the simple and predictable rules already adopted by this Court in *East River* and *Saratoga*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary disposition on the first question presented in light of its recent decisions in *O'Melveny* and *Atherton*.

Respectfully submitted.

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